Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

Microsoft Corporation, Plaintiff, v. Motorola, Inc., Motorola Mobility LLC, and General Instrument Corporation, Defendants.	No. C10-1823-JLR BRIEF OF NONPARTIES RESEARCH IN MOTION LIMITED AND RESEARCH IN MOTION CORPORATION REGARDING MOTOROLA'S PROPOSALS FOR HANDLING OF CONFIDENTIAL PATENT LICENSE EVIDENCE; NOTICE OF FILING OF PETITION FOR WRIT OF MANDAMUS

On November 16, 2012, this Court requested briefing regarding proposals submitted by Motorola for the handling and protecting of confidential patent licensing information of third parties during the ongoing trial against Microsoft. Nonparties Research in Motion Limited and Research in Motion Corporation (collectively, "RIM") hereby submit their brief, and also provide notice that they intend to seek a writ of mandamus requesting that the Ninth Circuit instruct this Court to vacate its November 12, 2012 Order.[1] RIM appreciates this Court's efforts and comments with respect to "easing the path" to the Ninth Circuit regarding

[1] Because RIM's confidential information may be disclosed this Tuesday, November 20, 2012, the Ninth Circuit's motions unit instructed RIM to file an emergency motion, and to do so before the motions unit and office of the clerk for the Ninth Circuit open Monday morning, November 19, 2012.

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the publishing of confidential information in its final order in this case establishing a RAND royalty rate, but it is the potential disclosure of confidential information this coming Tuesday, November 20, 2012 that is of utmost and urgent concern to RIM. If RIM confidential information is disclosed during trial and connected to RIM, any favorable ruling from the Ninth Circuit will be "too little, too late."

Motorola's "Camouflage" Proposal

Motorola has made two proposals to the Court. As this Court described it, one proposal involves "new and improved redacted exhibits which somehow camouflage the party that they refer to." (11/16/2012 Tr. at 5:22-23.). This proposal is inadequate to protect RIM's confidential information. As both this Court and Motorola's counsel have acknowledged, Motorola's "camouflage" proposal is imperfect: (1) identifying information may be inadvertently disclosed by the attorneys or witnesses themselves (as they have access to the exhibits in unredacted form); or (2) savvy listeners in the audience, many of them competitors in the smartphone industry, will simply "see what crumbs fall to the floor" (*id.* at 7:1) and "put it together." (*Id.* at 5-6.)

Motorola's counsel described the first proposal this way:

> MR. JENNER: And, if I understand, Your Honor is saying that you are accepting the proposal that we submit a new set of numbered but unnamed exhibits, so that as we refer to the number of exhibits, the gallery, at least on the record, won't have any reason to recognize who the exhibit is. ***If they put it together, they put it together.*** But that's okay to proceed that way?
>
> THE COURT: That's correct.

Id. at 8:1-7 (emphasis added). Motorola's counsel further stated:

> Continuing with the procedure that the court has set forth in your order earlier this week, we understand with the overlay that we would be, where necessary, using the numbered exhibits rather than names. I think we can

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> work with that and ***hopefully we won't foul it up ourselves by revealing information, as I think has happened at least once.***
>
> * * *
>
> I guess in terms of making this process work, ***I will be the first person to admit probable imperfections in bringing the procedure to pass,*** but we will do our best to try to make that work.

Id. at 8:24-9:4; 8-11 (emphasis added).

Indeed, Motorola argued against such a proposal when Microsoft first advocated it. Microsoft argued that "the most efficient way to handle this information at trial is for the Court to instruct the attorneys, witnesses, and experts to avoid audibly disclosing any royalty or pricing terms." (Dkt. No. 533 at 3.) Microsoft further argued that the "witnesses and attorneys should refer to the financial terms only through reference to exhibits on which the terms appear – exhibits that will not be displayed to the public." Motorola, however, responded that:

> Given the complexity of the issues and the multiplicity of documents, together with the relatively small amount of time allocated for each side to present its case and the pressures of rigorous cross examination, it is possible that witnesses or attorneys will inadvertently publically disclose information that should remain confidential. Given the media attention focused on this trial, redaction of the transcript after the fact alone is not sufficient to prevent such information from being used to cause competitive harm.

(Dkt. No. 551 at 6-7.) Motorola also argued that such a proposal would produce a murky and muddled record. Microsoft, too, now opposes the proposal it previously favored, on the grounds that it would prevent full cross-examination regarding the comparability of the license agreements.

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Motorola's Proposal to Close the Courtroom and Withdraw Confidential Information If Necessary

The second proposal involves closing the courtroom on Tuesday, November 20, 2012 when confidential patent licensing information is to be presented, coupled with a request for relief to the Ninth Circuit. In the event of an unfavorable ruling from the Ninth Circuit, Motorola further proposed that it be permitted to withdraw from the record any confidential information that would otherwise become public in this Court's final order. This proposal would allow Motorola to avoid breaching its confidentiality obligations, as well as allow Motorola and third parties like RIM to seek immediate appellate consideration of the controlling law regarding sealing of such licensing information not only in published opinions, *but at trial as well.*

RIM respectfully submits that the second option involving the closing of the courtroom, a ruling from the Ninth Circuit, and Motorola's agreement *and ability* to withdraw confidential information in view of that ruling, is the only way to effectively balance RIM's needs to protect its confidential information with the public's interest here.[2] In the alternative, RIM requests that this Court stay the Tuesday proceedings until such time as the Ninth Circuit weighs in on RIM's petition.

[2] The Court indicated that it would not close the courtroom because the attorneys were not to identify third parties when examining witnesses. (*Id.* at 10:22.) The Court also seemed to indicate that Motorola could not withdraw evidence, for the same reason: "[I]f you decide that you want to present it, it's going to be presented, and there's no way to then withdraw it. But it will be presented in the modified form that I've discussed." (*Id.* at 12:9-12.) And even if Motorola decided to omit such information in the first instance, the Court expressed concern that "I'm not sure we can avoid this issue" because there is no guarantee that Microsoft will not address the information. (*Id.* at 12:16-17.)

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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